

FairTest

National Center for Fair & Open Testing

WHY YOU CAN BOYCOTT STANDARDIZED TESTS WITHOUT FEAR OF FEDERAL PENALITIES TO YOUR SCHOOL

States, districts and schools sometimes claim they will lose federal Title I funds if parents, students or teachers boycott standardized tests required under No Child Left Behind (NCLB), a position reinforced by statements from U.S. Department of Education (DOE) officials.

As far as we know, no school or district anywhere in the country has ever been penalized for failing to test enough (95%) of its students. Further, seven states (Utah, Wisconsin, Pennsylvania, Minnesota, Oregon, Washington and California) have laws allowing opt out, and none have been sanctioned. Parents, students and teachers generally should not fear harmful consequences to their schools due to federal law if parents boycott standardized tests. Here is why:

95% Rule

NCLB says that 95% of students must take the test or the school will fail to make “adequate yearly progress” (AYP) and then suffer sanctions. However, this provision is now essentially irrelevant.

First, *schools that do not receive federal Title I funds are exempt from sanctions* under NCLB. Those schools are labeled as not making AYP, but NCLB does not require a state to do anything to them.

Second, 41 states (plus DC and Puerto Rico) have *waivers* from the U.S. Department of Education (DOE) that have eliminated the sanctions imposed on most schools that fail to make AYP. The basic message is that *in waiver states, a school not in or close to the bottom 5% (“priority schools”) likely has nothing to fear from a boycott.* However, a school that is at or close to the bottom 5% would be advised to proceed with caution. Parents may not want to increase the likelihood of severe sanctions (staff firings, turning it into a charter school) by having very low scores (or low rates of score increases) and many opt outs. “Priority” schools will want to make the 95% threshold to get out of that status. (For more on waivers, see the notes, below.)

Third, *in states without a waiver, every school must now have 100% of its students score “proficient.”* As a result, almost all schools are “failing” and face possible sanctions. But if a school is already failing, *there is no additional danger from a boycott.*

In addition, the 95% rule does not pertain to any tests other than reading and math exams mandated by NCLB. Separate tests used to judge teachers in other subjects as well as other state or district-mandated tests are not covered by this requirement.

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There may be some risk for some schools due to the 95% rule. But for the great majority of schools, including Title I schools, the risk is minimal at most and should not be a reason to avoid boycotts.

Loss of Funds

The claim that schools will lose funding is true only in a limited way.

For states without a waiver: Under NCLB, a school that fails to make AYP for two years must set aside up to 15% of its Title I federal funds to use for transporting volunteer students to a non-failing school. Because nearly all schools are now ‘failing,’ the transfer issue has become irrelevant. If a school does not make AYP for three years, it must put aside up to 15% of its Title I funds for ‘supplemental educational services’ (‘tutoring’). The 15% funds are not available for regular school use. Districts, however, are eligible to run their own SES programs.

In a state with a waiver, a “priority” school must set aside 5-15% of its federal Title I and II funding to use in state-approved programs in the school. The money is not “lost.” It generally may be used for various school improvement efforts.

Unable to use AYP-based sanctions, the DOE has moved to protect testing requirements by relying on the fact that NCLB is essentially a contract with each state, and states are required to fulfill the contract. The DOE claims it can withhold funds if states fail to fulfill any part of the law.

Assistant Education Secretary Deborah Delisle said she expected state superintendents to pressure parents to comply. She added that the DOE could consider other federal education requirements to use against schools that do not receive Title I. But she also acknowledged the Department does not intend to take funding away from programs that serve children – perhaps because the Department lacks adequate authority to do so, perhaps for fear of political backlash.

Experts have pointed out that any efforts by the federal government to withhold money would have to go through multiple steps that take substantial time. By that point, the Obama administration would be out of office and possibly a new federal law will be in place.

The DOE statements should be viewed as political bluster intended to intimidate parents, teachers and students. For example, by focusing only on the requirement to test 95% of eligible students, DOE is cherry-picking provisions to enforce. It has *not* threatened to impose sanctions for failure to meet other NCLB testing requirements such as assessing “higher order thinking skills,” using “multiple measures,” or providing meaningful individual “diagnostic reports.”

Pending federal legislation may further undermine the ability of states to use NCLB to intimidate test refusers. While bills moving forward in both houses require 95% participation, an amendment accepted unanimously by the Senate education committee says nothing in the new NCLB would preempt any state or local law allowing parents to refuse federally-mandated tests.

Notes and links

These comments are generally applicable to all states. However, it is possible, for example, that your state is labeling more than 5% of schools as ‘priority’ (under waivers) or includes non-title I schools under NLCB sanctions (for non-waiver states), though we do not know of such states.

In addition, if your state or district has a high school graduation test or requires children to pass a test to be promoted to the next grade or get into a special school, your child likely will be at risk if you boycott. And your state may grade schools in ways that could be affected by boycotts (e.g., get a lower grade, which may or may not carry consequences).

▪ The NCLB law is at <http://www2.ed.gov/policy/elsec/leg/esea02/index.html>; specific points include:

- 95% requirement is at Sec. 1111(a)(2)(I)(2)(ii);
- exempt from the sanctions under NCLB is at Sec. 1116(b)(2)(A)(ii).
- escalating sanctions are specified at Sec. 1116 for schools (b) and districts (c).

▪ Delisle's statement is in response to a question, which starts before minute 43 at http://www.livestream.com/leaderstolearnfrom2015/video?clipId=pla_556a18ff-d988-45c8-bc9c-c2369ceda76d&utm_source=lslibrary&utm_medium=ui-thumb.

▪ States with *waivers* agreed that they would intervene strongly in the lowest-scoring 5% of their schools, labeled "priority" schools. (Another 10% are "focus" schools, but consequences are minimal.) States have identified their 5% schools. Schools that make sufficient test score gains will come off the list, while those that do not will remain on. States can choose to intervene in more schools, but to our knowledge they have not. Over the next few years, states may replace exiting priority schools with new ones. Waivers were issued to most of the states through 2014-15, and states are currently renewing them. If a state loses its waiver, NCLB requirements will again come into force - but almost all the schools will already have failed, making the 95% requirement irrelevant. A brief US Ed. Dept. description of waivers is at <http://www.ed.gov/sites/default/files/supporting-state-local-progress.pdf>.

▪ A good discussion of New York's waiver, testing, opting out and school funding is at <http://www.nysape.org/if-my-child-refuses-state-tests-will-my-school-lose-funding.html>; it includes a 'worst case' scenario.

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